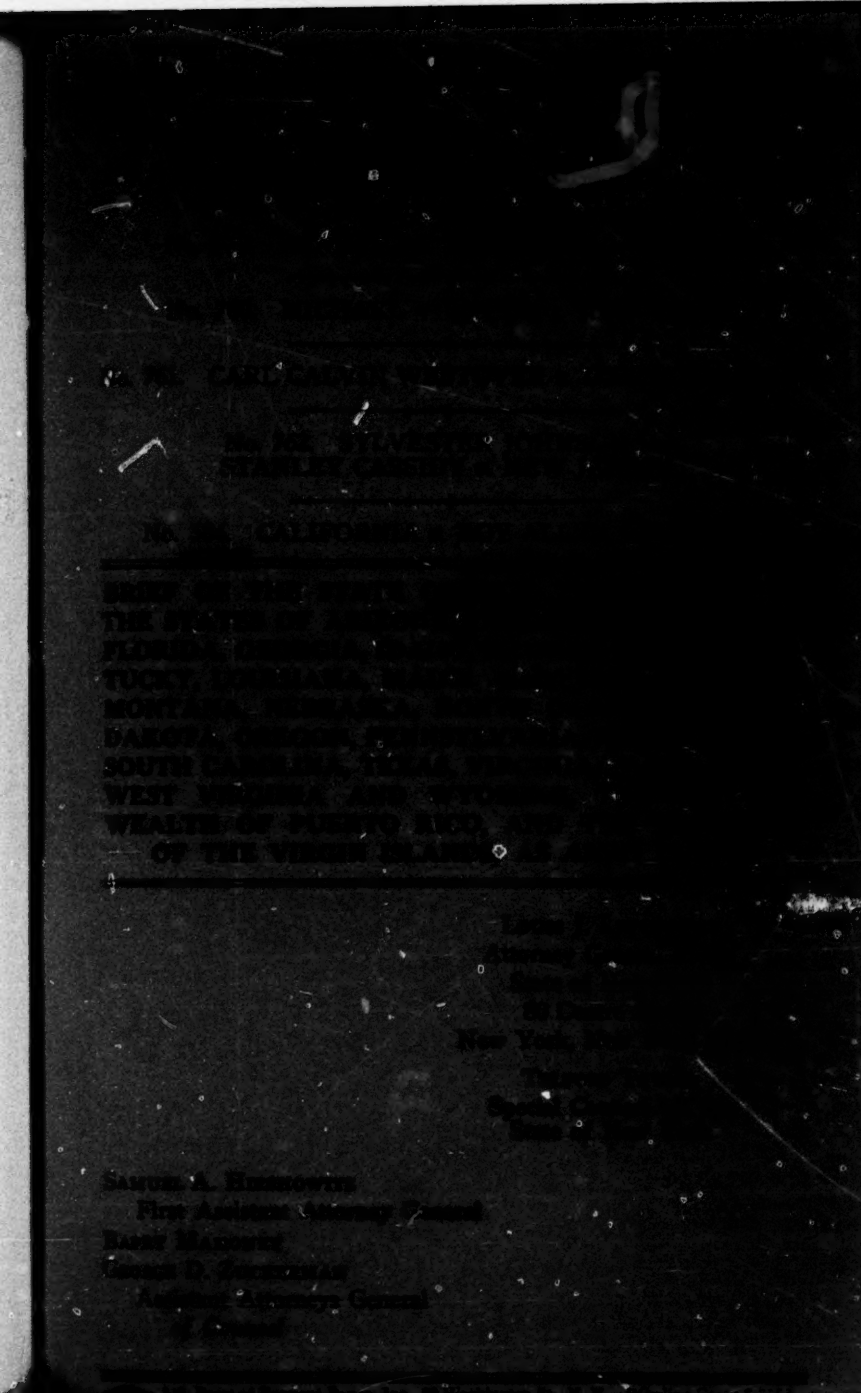

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 759

ERNESTO A. MIRANDA, Petitioner,

against

THE STATE OF ARIZONA, Respondent.

No. 760

MICHAEL VIGNERA, Petitioner,

against

NEW YORK, Respondent.

No. 761

CARL CALVIN WESTOVER, Petitioner,

against

UNITED STATES OF AMERICA, Respondent.

No. 762

SYLVESTER JOHNSON and STANLEY CASSIDY, Petitioners,

against

NEW JERSEY, Respondent.

No. 584

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner,

against

ROY ALLEN STEWART, Respondent.

BRIEF OF THE STATE OF NEW YORK, JOINED BY THE STATES OF ARIZONA, COLORADO, DELAWARE, FLORIDA, GEORGIA, IDAHO, ILLINOIS, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MISSOURI, MONTANA, NEBRASKA, NORTH CAROLINA, NORTH DAKOTA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TEXAS, VIRGINIA, WASHINGTON, WEST VIRGINIA AND WYOMING, THE COMMONWEALTH OF PUERTO RICO, AND THE TERRITORY OF THE VIRGIN ISLANDS, AS *AMICI CURIAE*

Interest of the *Amici*

The petitions for certiorari in the above cases raise such questions as whether criminal suspects must be advised, prior to arraignment, of a right to be silent or of a right to have counsel; whether counsel must be furnished to suspects upon request, or even in the absence of request; whether pre-arraignment statements of an accused taken in the absence of counsel must be excluded at trial; and whether newly-established constitutional rules limiting the admissibility of statements made by a defendant prior to his arraignment must be applied retroactively.

The interest of the Attorney General of the State of New York in these questions is substantial. As the chief legal officer of the State of New York (N. Y. Executive Law § 63), the Attorney General is concerned with maintaining a fair balance between effective law enforcement to protect society against crime and the observance of procedural due process in the administration of criminal justice. In pursuance of these purposes the New York Attorney General has actively cooperated with the State's Commission on Revision of the Penal Law and Code of Criminal Procedure, and has himself initiated and sponsored legislation aimed at raising the State's standards of criminal justice.[1]

As a prosecuting officer in specified areas of criminal conduct, and as an advisor to the district attorneys of the State and to the State's judicial officers, the New York Attorney General is likewise cognizant of the huge volume of

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[1] See, *e.g.*, N. Y. Laws of 1965 c. 878, establishing a requirement that every county provide counsel for indigents charged with crime, misdemeanors as well as felonies, and requiring the counties to provide expert, investigative and other services necessary for an adequate defense.

criminal cases handled by the New York courts[1] and of the fact that the questioning of suspects in criminal cases, particularly in cases involving serious felonies, has often been of significant assistance in the solution of crime.

In addition, the New York Attorney General, as counsel to the officers of state correctional institutions who are named as respondents in writs of habeas corpus, is concerned with the seriously disruptive effects upon the administration of justice which would inevitably flow from a retroactive application of new exclusionary rules limiting the admissibility of pre-arraignment statements.

The other Attorneys General subscribing to this brief are charged with similar duties and are equally concerned with these issues. Mindful of the precedents that these cases may establish with regard to pre-arraignment procedures in every State, the States of Arizona, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Missouri, Montana, Nebraska, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Virginia, Washington, West Virginia and Wyoming, the Commonwealth of Puerto Rico, and the Territory of the Virgin Islands join the State of New York in presenting their position in this brief *amici curiae* filed with the Court pursuant to Rule 42.

Questions Presented

Since this brief is not filed in support of either affirmance or reversal of any of the five cases to which it re-

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[1] For example, in 1963, the Supreme Court and County Courts of New York disposed of the cases of 19,888 criminal defendants charged with felonies and misdemeanors. 10 N. Y. Judicial Conference Ann. Rep. 416 (1965). This figure does not include 452,271 felonies and misdemeanors handled in inferior courts in 1963, nor the several million summary offenses—mostly traffic violations—disposed of in New York every year. 10 N. Y. Judicial Conference Ann. Rep. 204-07, 418-19 (1965).

lates, the questions are stated in general terms, rather than in the factual framework of any of the cases:

1. Whether an arrested suspect's lack of the assistance of counsel at the time he makes a pre-arraignment statement renders the statement constitutionally inadmissible at his trial.[1]

2. Whether rules presently or hereafter established within the ambit of the first question should be retroactively applied.

Summary of Argument

I

We oppose the establishment of new constitutional restrictions on the admissibility of pre-arraignment statements made in the absence of counsel. Neither the literal text nor the originally intended meaning of the "Assistance of Counsel" clause of the Sixth Amendment comprehend pre-adjudicatory stages of criminal procedure. Extension of the clause to pre-arraignment proceedings must therefore depend on a showing that such extension is required by developing concepts of fairness beyond the ambit of the original understanding. In fact, no such showing has been made. Therefore the holding of *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), should not be made the basis for a general exclusionary rule of constitutional dimension.

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[1] The five cases present this question under varying attendant circumstances. See note 2, *infra*, page 11. As used in this brief, the term "arraignment" refers to the individual's first appearance before a judicial officer subsequent to his arrest. New York law requires that the magistrate before whom the individual is brought inform him at this time, and before any further proceedings are had, of his right to the assistance of counsel; and that, if he desires counsel but is financially unable to obtain counsel, then counsel will be assigned. See N. Y. Laws of 1965, c. 878, amending N. Y. Code Cr. Proc. §§ 188, 190 and 699.

This Court has repeatedly recognized the importance of pre-arraignment interrogation in the law enforcement process. See, *e.g. Haynes* v. *Washington*, 373 U. S. 503, 515 (1963). Empirical evidence now in hand affords no basis for challenging this evaluation. The Court has also recognized the hindrances which would be caused by a general requirement of counsel at the pre-arraignment stage. *Cicenia* v. *LaGay*, 357 U. S. 504, 509-511 (1958). Adoption of the exclusionary rules urged by defendants in these cases would result either in the virtual elimination of pre-arraignment interrogation, or the large scale installation of defense counsel at police stations, or both of these consequences in unpredictable proportions. Empirical evidence justifying such consequences is lacking, and neither professional nor general public concepts of fairness warrant a constitutional requirement of such fundamental changes in pre-arraignment procedures.

Procedural development in this area should take place in non-constitutional terms. State courts and legislatures, and professional organizations such as the American Law Institute, are currently and closely concerned with pre-arraignment procedures, and are alert to the need for mitigating the legal disadvantages of the indigent and uneducated. Progress toward this end, with due regard for the needs of law enforcement, will be surer with the effective participation of these agencies.

II

To whatever extent new exclusionary rules may be established in these cases or may be deemed already established by *Escobedo* v. *Illinois, supra,* such rules should not be given retroactive application. The same considerations which militated against retroactive application of newly established rules barring the admission of illegally seized evidence (*Linkletter* v. *Walker*, 381 U. S. 618 [1964]) and prohibiting adverse comment by a trial judge upon a defendant's failure to testify at a criminal trial (*Tehan* v.

Shott, —— U. S. ——, 34 U.S.L. Week 4095 [1965]) weigh heavily against retroactive application of any new rule limiting the admissibility of pre-trial statements which are not shown to have been involuntary.

There can be no doubt but that, at least prior to the decision in *Escobedo* v. *Illinois*, there was considerable and justifiable reliance by the state judicial systems upon this Court's earlier decisions establishing voluntariness as the criterion governing admissibility of a defendant's inculpatory pre-trial statement. See, *e.g.*, *Crooker* v. *California*, 357 U. S. 433 (1958). For this Court to apply a new exclusionary rule retroactively, without regard to the voluntariness of challenged statements, would be to hold that state courts and prosecutors should not have used evidence which this Court had previously told them was admissible.

The primary purpose of any new exclusionary rule limiting the admissibility of pre-trial statements would undoubtedly be to prevent police coercion and ensure that an individual's privilege against self-incrimination remains meaningful. Retroactive application would not further this purpose, however—to the extent that an exclusionary rule is an effective deterrent to police misconduct, it is because the police, after the establishment of such a rule, may be expected to act with knowledge of its sanctions. Nor would the policy of protecting the innocent be furthered by retroactive application—to the extent that the absence of counsel may have contributed to the making of an involuntary and hence possibly unreliable statement, relief is already available. See *Reck* v. *Pate*, 367 U. S. 443 (1961); *Fay* v. *Noia*, 372 U. S. 391 (1963). Judicial integrity would be diminished by such an application, since the precedental value of court decisions would be seriously undermined. Retroactive application of new exclusionary rules would not be conducive to the orderly administration of criminal justice either. Numerous old convictions would be reopened and persons convicted of serious crimes, on

reliable evidence of their guilt, would be the principal beneficiaries.

Retroactivity would also be likely to impose serious restraints upon the progressive development of new rules by the state courts. Surely one important reason why some state courts have felt free to establish new exclusionary rules has been their reasonable expectation that the new rules would not affect past cases in which convictions have become final. In addition, retroactive application would impose serious strains on the resources of the bench and bar in all the states, to the detriment of those individuals who have more deserving claims for post-conviction relief and to the detriment of the social interest in meeting pressing problems in other areas of criminal law.

Argument

The first of the two questions to which this brief is primarily addressed is raised in various forms and factual settings in all five of the instant cases, and the second question in No. 762, *Johnson and Cassidy* v. *New Jersey*. Although they are disparate in important respects, the two questions are closely interlocked, in that the reasoning and conclusions adopted for the first may well affect if not govern the answer to the second.

A basic part of our position on both of these questions is the proposition that the constitutional claims asserted in these cases are part of a developmental process rather than an "original understanding".[1] Accordingly, we be-

[1] Compare the conflicting approaches to the "original understanding" of the Fourteenth Amendment in Mr. Justice Black's dissenting opinion in *Adamson* v. *California*, 332 U. S. 46, 68-123 (1947), and Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights: The Original Understanding*, 2 Stan. L. Rev. 5 (1949). Assuming (in line with Mr. Justice Black's position) "total incorporation" of the Sixth Amendment in the Fourteenth, we think it clear (*infra*, pp. 15-17) that the original understanding of the "Assistance of Counsel" clause did not comprehend the claims asserted here.

lieve that the Court may and urge that it should take full account of contemporary factors in determining whether, when, and how much to expand the constitutional dimension of the right to counsel in the pre-arraignment stage of a proceeding. Our assessment of these factors comprises the main body of this brief.

I

The Court should not presently enlarge the constitutional dimension of pre-arraignment rights to the assistance of counsel.

The constitutional test to be applied in determining the admissibility of confessions was restated by this Court, speaking through Mr. Justice Goldberg, in *Haynes* v. *Washington*, 373 U. S. 503, 513:

> "'[T]he question in each case is whether the defendant's will was overborne at the time he confessed' *Lynum* v. *Illinois*, 372 U. S. 528, 534. 'In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort.' *Wilson* v. *United States*, 162 U. S. 613, 623. See also *Bram* v. *United States*, 168 U. S. 532. And, of course, whether the confession was obtained by coercion or improper inducement can be determined only by an examination of all of the attendant circumstances."

The application of this test resulted in reversal of the conviction in the *Haynes* case upon the Court's conclusion that the interrogation of the petitioner while under detention for sixteen hours, the denial of his requests for counsel, and the refusal of the police to permit petitioner to telephone his wife until he signed a confession, demonstrated the involuntariness of the confession.[1]

[1] Other recent instances in which this Court has set aside convictions upon determining that the confessions in question did not meet the test of "voluntariness" include *Lynumn* v. *Illinois*, 372 U. S. 528 (1963); *Culombe* v. *Connecticut*, 367 U. S. 568 (1961); *Reck* v. *Pate*, 367 U. S. 433 (1961); *Blackburn* v. *Alabama*, 361 U. S. 199 (1960); and *Spano* v. *New York*, 360 U. S. 315 (1959).

The following year in *Escobedo* v. *Illinois*, 378 U. S. 478, this Court considered the admissibility of a pre-arraignment statement in the context of the Sixth Amendment guarantee of the right to "the assistance of counsel".[1] The scope of that decision has been the subject of numerous and conflicting decisions in both State and Federal courts[2] and extensive discussions in legal periodicals.[3]

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[1] To whatever extent that case is deemed to establish a "new" rule concerning the admissibility of confessions, a problem of retroactivity is raised, which is discussed in Point II of this brief.

[2] See, *e.g.*, *State* v. *Miranda*, 98 Ariz. 18, 401 P. 2d 721 (1965), *cert. granted*, 86 Sup. Ct. 320; *Commonwealth ex rel. Linde* v. *Maroney*, 416 Pa. 331, 206 A. 2d 288 (1965); *State* v. *Worley*, 178 Neb. 232, 132 N. W. 2d 764 (1965); *Bean* v. *State*, 398 P. 2d 251 (Nev. 1965); *People* v. *Hartgraves*, 31 Ill. 2d 375, 202 N. E. 2d 33 (1964), *cert. denied*, 380 U. S. 961; *Anderson* v. *State*, 237 Md. 45, 205 A. 2d 281, 285 (1964); *State* v. *Smith*, 43 N. J. 67, 202 A. 2d 669, 678 (1964), *cert. denied*, 379 U. S. 1005; *Browne* v. *State*, 24 Wis. 2d 491, 131 N. W. 2d 169 (1964), *cert. denied*, 379 U. S. 1004; *State* v. *Fox*, 131 N. W. 2d 684 (Iowa 1964); *Galarza Cruz* v. *Delgado*, 233 F. Supp. 944 (D.P.R. 1964); *State* v. *Dufour*, 206 A. 2d 82 (R. I. 1965); *State* v. *Neely*, 239 Ore. 487, 398 P. 2d 482 (1965); *Commonwealth* v. *Negri*, 213 A. 2d 670, 672 (Pa. 1965); *Commonwealth* v. *McCarthy*, 200 N. E. 2d 264 (Mass. 1964); *Campbell* v. *State*, 384 S. W. 2d 4 (Tenn. 1964); *United States* v. *Cone*, —— F. 2d —— (2d Cir., dec'd Nov. 22, 1965, slip op. p. 3391); *United States* v. *Drummond*, —— F. 2d —— (2d Cir., dec'd Dec. 2, 1965, slip op. p. 3225); *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (3d Cir. 1965); *United States ex rel. Davis* v. *North Carolina*, 339 F. 2d 770 (4th Cir. 1965), *cert. granted*, 86 S. Ct. 438 (1965); *Collins* v. *Beto*, 348 F. 2d 823 (5th Cir. 1965); *United States ex rel. Walden* v. *Pate*, 350 F. 2d 240 (7th Cir. 1965); *Jackson* v. *United States*, 337 F. 2d 136 (D. C. Cir. 1964).

[3] See, *e.g.*, Enker & Elsen, *Counsel for the Suspect: Massiah* v. *United States and Escobedo* v. *Illinois*, 49 Minn. L. Rev. 47 (1964); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929 (1965); Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure in* CRIMINAL JUSTICE IN OUR TIME (U. Va. Press 1965); Vorenberg, *Police Detention and Interrogation of Uncounselled Suspects: The Supreme Court and the States*, 44 Boston Univ. L. Rev. 423 (1964); Dowling, *Escobedo and Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure*, 56 Journal of Criminal Law, Criminology and Police Science 156 (1965).

Whatever may in other respects be the verdict of judicial history, we think that *Escobedo,* and other recent decisions of this Court in the field of criminal procedure, have had a beneficial effect insofar as they have awakened the interest and concern of bench and bar, legislators and executive officials, police and social welfare agencies to current and crucial problems of criminal law enforcement. In the forefront of those whose concern has taken the form of organized study and the formulation of practical proposals are the American Bar Association, the American Law Institute, and the New York Commission on Revision of the Penal Law and Code of Criminal Procedure.

Because the defendant in the *Escobedo* case had already retained a lawyer and had requested opportunity for consultation which the police had denied him, prior to his confession, the case is susceptible of narrow interpretation. Indeed, this Court's own statement of the holding is very particularly worded (378 U. S. at 490):

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon* v. *Wainwright,* 372 U. S., at 342, 83 S. Ct., at 795, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

We do not suggest that the *Escobedo* case be robbed of principled basis and practical effect by an overly meticulous insistence on its details. But we do read its holding, quoted above, as a warning that substantial variation in circumstances will require fresh consideration of the consequences. And we urge, for the reasons herein set forth, that the present cases should not be the occasion for any substantial expansion of its impact in the constitutional dimension.

These five cases (as well as a sixth to be heard later this term[1]) present a spectrum of questions closely related to those dealt with in the *Escobedo* case. As already indicated, it is not our purpose to seek either affirmance or reversal of any of these cases, for the reason that all five of them involve issues in addition to those of present interest to the *amici curiae*,[2] which may be determinative of their several outcomes.

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[1] *Davis* v. *North Carolina*, 339 F. 2d 770 (4th Cir. 1965), *cert. granted*, —— U. S. ——, 86 S. Ct. 438 (Dec. 13, 1965), transferred to appellate docket as No. 815, Oct. Term, 1965 (34 U.S.L. Week 3223).

[2] Thus No. 760, *Vignera* v. *New York*, involves a twenty-four hour period of detention prior to arraignment, from which petitioner projects arguments primarily derived from *McNabb* v. *United States*, 318 U. S. 332, and *Mallory* v. *United States*, 354 U. S. 449.

No. 761, *Westover* v. *United States*, likewise involves *McNabb-Mallory* questions, and furthermore is a federal court case, so that statutory and "supervisory" as well as constitutional factors are present. Other unrelated questions (evidentiary and procedural) are also raised.

In No. 762, *Johnson and Cassidy* v. *New Jersey*, petitioners have raised questions pertaining to self-incrimination through comment to the jury, severance, and improper prosecution argument and summation.

In No. 584, *California* v. *Stewart*, and No. 759, *Miranda* v. *Arizona*, in addition to the issues pertaining to the assistance of counsel, there are questions concerning the absence or adequacy of the warning given to the accused that he had a right to remain silent; these questions are likewise present in the *Vignera* case.

Rather, we wish to lay before the Court various considerations bearing on the role of *constitutional* decision-making in this complicated and contentious area. The inclusion in this group of cases of one (No. 761, *Westover* v. *United States*) from the federal judicial system underlines the distinction which, familiar though it may be, merits emphatic reiteration at this time. For in the *Westover* case (assuming that the unrelated evidentiary and procedural questions are not determinative) this Court must take account of federal statutory policy and its own responsibilities for supervision of the federal judicial process, and may find it wise to enunciate general federal rules derived from these sources.

In the other four cases, the Court should, we respectfully submit, give heed both to the limitations of the federal constitutional source and to the enduring impact and comparative inflexibility of constitutional decision-making. Accordingly, in the ensuing text, we invite the Court's attention to the historical content of the "Assistance of Counsel" clause; to the alarming paucity (soon, we hope, to be mitigated) of empirical data pertaining to the role of pre-arraignment interrogation in law enforcement and the probable effect of a general requirement that counsel be present at such interrogation; to the difficulties which courts and bar would encounter in meeting drastic new requirements of universal application; and to the importance of effective participation in the solution of these questions by legislative bodies, professional associations, and other official and private agencies importantly concerned.

A. Elements of the constitutional issue

The manner and extent to which the provisions of the Bill of Rights are "incorporated in" and made applicable to the States by the Fourteenth Amendment remains a matter of dispute within the Court.[1] In our approach to the

issues of these cases we assume, *arguendo*, that the Sixth Amendment guarantee of the right to the assistance of counsel applies in the same manner and with the same force to the States as to the Federal government, i.e., that in constitutional terms the right to counsel is the same under the Sixth and Fourteenth Amendments.[2] So regarded, some of the constitutional issues presented by these petitioners appear to be:

(a) At what point after the initial contact between a police officer and an individual in which the individual's knowledge of or connection with an actual or suspected crime is discussed does the individual have a constitutional right to the assistance of counsel?

(b) When the right described in (a) arises does the individual have a simultaneous or subsequent constitutional right to be effectively informed of a right to counsel?

(c) When the rights described in (a) and (b) have arisen and if the individual is unable, for financial or other reasons, to obtain counsel for himself, are the arresting authorities, either then or subsequently, constitutionally obligated to provide him with counsel?[3]

(d) Are statements made by an individual, at a time when his rights under (a), (b) or (c) have been violated, constitutionally inadmissible?

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[1] See the concurring opinion of Mr. Justice Harlan in *Ker* v. *California*, 374 U. S. 23, 44-45 (1963), and his dissenting opinion in *Griswold* v. *Connecticut*, 381 U. S. 479, 500. *Cf.* Mr. Justice Stewart's remark in *Massiah* v. *United States*, 377 U. S 201, 205: "Here we deal not with a state court conviction but with a federal case, to which the specific guaranty of the Sixth Amendment directly applies.

[2] There may, of course, be additional standards drawn from statutes or from this Court's judicial supervisory powers.

[3] It would appear to be established that the right to retain one's own counsel is at least somewhat more extensive than the right to have counsel supplied. *Chandler* v. *Fretag*, 348 U. S. 3, 9 (1954).

That these rights have attached in a constitutional sense at the time of trial was settled by *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). That they have attached at the time of any important pre-trial proceeding of a judicial nature is established by *Hamilton* v. *Alabama*, 368 U. S. 52 (1961) (arraignment), and *White* v. *Maryland*, 373 U. S. 59 (1963) (preliminary hearing). The issue raised by the present cases is whether they shall now be held to attach in whole or in part at some time prior to arraignment which (as earlier indicated) we use here not in a technical sense but as indicating the accused's first appearance before a judicial officer.

The *Gideon* case did not arise in the context of an exclusionary rule; deprivation of counsel was held to invalidate the entire proceeding. Trials and arraignments that are defective can be held again subject to correction of the errors but of course this is not true of pre-arraignment questioning. So far it has not been seriously suggested that lack of counsel in the pre-arraignment stages should vitiate the entire proceeding and immunize the suspect against prosecution. In contrast to the *Gideon* case, accordingly, the constitutional issues here stirred in the pre-arraignment stages are exclusionary in nature and are to be answered in terms of the admissibility of statements made by the accused during these early stages.

In approaching these issues the State of New York and the other *amici curiae* wish to emphasize their strong support for measures effectively designed to reduce the legal disadvantages which commonly afflict the poor and unsophisticated. There is deep and widespread need for better public education in the structure and detail of individual rights and for the provision of counsel for the indigent.

The question remains how far and in what ways the law in general and Federal Constitutional Law in particular can best contribute to those ends, in the setting of a so-

ciety in which other values, including the speedy apprehension of criminals and safety of the citizenry, also have an important place.

B. Historical factors and established practice

In No. 759, *Miranda* v. *Arizona,* the petitioner observes (Br. p. 11) that in these cases: "We deal . . . with growing law, and look to where we are going by considering where we have been." We think that it is indeed sound to recognize and wise to emphasize that this case does not concern any "original understanding" of the Sixth Amendment's guarantee of the right to assistance of counsel, and that the claims here asserted go far beyond the scope of that clause either as originally intended or as construed and applied during the intervening years.

There is simply no historical basis for the constitutional requirements now suggested, which would exclude all pre-arraignment statements made by a suspect where the state failed to furnish him with counsel. "Text, context and history of the Sixth Amendment lead to the conclusion that the framers were addressing themselves to judicial proceedings, where a person is obliged to defend himself in a process fraught with the technicalities and procedural niceties of the criminal law." *United States* v. *Cone,* —— F. 2d —— (2d Cir., dec'd Nov. 22, 1965; Slip Op. pp. 3391, 3399); see also Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 Calif. L. Rev. 929, 943-944, 946 (1965).

Shortly after proposing the first ten amendments to the Constitution, the First Congress on April 3, 1790 passed an act providing for the assignment of counsel only in trials for treason and other capital crimes. 1 Stat. 118, Rev. Stat. § 1034, now found in 18 U.S.C. § 3005. If the guarantee of the Sixth Amendment were regarded as imposing a duty on the part of a trial judge to assign counsel to the defendant in all criminal cases, this statutory provision

would have been superfluous. The obvious implication of such a statute was that the First Congress considered the courts to be under no legal obligation to appoint counsel in other than capital cases.

Indeed, as late as 1800, it appears that only in New Jersey by statute, and in Connecticut by practice, did the accused enjoy a full right to retain counsel in a criminal trial, and to have counsel appointed if he were unable to afford it. With the exception of these two states, the right to counsel was interpreted to mean the right of a defendant at a criminal trial to retain counsel of his own choosing and at his own expense. Beaney, THE RIGHT TO COUNSEL IN AMERICAN COURTS, 21 (1955). As Judge Friendly has written:

> "History leaves no doubt that the assistance of counsel clause was aimed at the practice that had grown up in England, whereby defendants charged with felonies other than treason could not have the aid of retained counsel at their trials with respect to issues of fact . . . The practice had been even more offensive in America where, in contrast to the mother country, professional prosecutors had to some extent come in vogue. At the time of the adoption of the Constitution, twelve states, as a part of their legal systems, had rejected the English rule. The counsel clause of the sixth amendment was intended to carry this forward; no one was thinking of the assignment of counsel . . ."[1]

Evolving concepts of fairness have made us aware that the assistance of counsel for one's defense is a fundamental right which should not be limited to enjoyment only by those who are rich enough to afford counsel or knowl-

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[1] Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 943-44 (1965). See also Judge Friendly's concurring opinion in *Collins* v. *Beto*, 348 F. 2d 823 at 832, 837 (5th Cir. 1965).

edgeable enough to request it (*Gideon* v. *Wainwright*, 372 U. S. 335 [1963]; *Johnson* v. *Zerbst*, 304 U. S. 458 [1937]). However, the purpose of the right to counsel has always been essentially that expressed by Mr. Justice Sutherland in his historic opinion for the Court in *Powell* v. *Alabama*, 287 U. S. 45, 68-69 (1932):

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable generally, of determining whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon improper evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

This view of the purposes of having the assistance of counsel for one's defense was quoted with approval by the Court in *Gideon, supra*, at 344-45. The present proposals for an extension of the right to a stage prior to the commencement of judicial proceedings obviously envision quite different purposes.

The purposes of such an extension do not relate to guiding an individual through the technicalities of the legal process. Rather, they relate to the fear that an individual's privilege against compulsory self-incrimination and his right to the meaningful assistance of counsel at trial will be lost if counsel is not provided at a period prior to the formal institution of a prosecution, and to a desire to

assure equal treatment for rich and poor. Granted that the protection of these rights is of the utmost importance, the fact remains that other values must also be weighed. The dimensions of the problem were described by Mr. Justice Jackson in his concurring opinion in *Watts* v. *Indiana*, 338 U. S. 49, 57 (1949) at 61-62:

> "I suppose no one would doubt that our Constitution and Bill of Rights, grounded in revolt against the arbitrary measures of George III and in the philosophy of the French Revolution, represent the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself. They were so intended and should be so interpreted. It cannot be denied that, even if construed as these provisions traditionally have been, they contain an aggregate of restrictions which seriously limit the power of society to solve such crimes as confront us in these cases. Those restrictions we should not for that reason cast aside, but that is good reason for indulging in no unnecessary expansion of them.
>
> I doubt very much if they require us to hold that the State may not take into custody and question one suspected reasonably of an unwitnessed murder. If it does, the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowl about unmolested. Is it a necessary price to pay for the fairness which we know as 'due process of law'? And if not a necessary one, should it be demanded by this Court? I do not know the ultimate answer to these questions; but, for the present, I should not increase the handicap on society."

C. The materials of decision

We have stressed the past, not because it provides the answers to the issues raised in these cases, but because it reveals a process and suggests an approach. As the peti-

tioner in *Miranda* rightly stresses, the constitutional right to the assistance of counsel has grown with the years and the times.

In short, the Court can not resolve these issues by seeking the original intention of those who framed the Bill of Rights or by verbal exegesis of the "Assistance of Counsel" clause, and must therefore find the primary material for decision in its appreciation of contemporary standards and circumstances. The temporal flexibility of general constitutional standards was remarked by Mr. Justice McKenna as early as 1910 in *Weems* v. *United States*, 217 U. S. 349, 373:

> "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions."

Commenting on this passage nearly half a century later, Chief Justice Warren, in *Trop* v. *Dulles*, 356 U. S. 86 (1958), wrote (at 100-101):

> "The Court recognized in that [the *Weems*] case that the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of maturing society."

These considerations apply to the Due Process Clause of the Fourteenth Amendment quite as much as to the Eighth Amendment[1] and their present import, we think, is both plain and of great moment. Since the Court is not here bound by history or verbal logic, the constitutional

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[1] At a later point in his opinion in the *Weems* case, Mr. Justice McKenna applied these generalizations directly to the Fourteenth Amendment (217 U. S. at 374).

standard may be applied with great flexibility, giving full weight to the bearing of contemporary empirical evidence of the need for and probable effect of the changes here sought.

These changes are not uniformly outlined, but in all these cases the defendants seek the establishment of a rule, to become effective at some point during pre-arraignment interrogation, at which the arrestee must either waive, obtain, or be provided with counsel, on pain of exclusion from evidence of any statement made in the absence of counsel. In No. 761 (*Westover*, Br. p. 34), petitioner would draw that line at the moment of custody; in No. 759 (*Miranda*, Br. p. 30), when interrogation begins; in No. 760 (*Vignera*, Br., pp. 10, 37-38) when the "accusatory" stage has been reached.

Under any of these proposals, it seems clear that the consequences would be:

(a) great reduction or virtual elimination of pre-arraignment interrogation of arrestees; or

(b) provision of counsel on a vast scale for arrestees, most of whom are indigent; or

(c) both (a) and (b) in varying degrees and unpredictable ratios.

We do not suggest that the statement of these consequences establishes them as undesirable. But we do suggest that they are of such a nature that further empirical investigation and analysis are necessary as a basis for general rule-making whether judicial or legislative. As was stated by Mr. Justice Black, dissenting in *Jackson* v. *Denno*, 378 U. S. 368 (1964) at 403 (commenting on the rule there adopted by the Court in line with the suggestions of commentators):

"None of these commentators appears to have gathered factual data to support his thesis, nor does it

appear that their arguments are at all rooted in the actual trial of criminal cases. Theoretical contemplation is a highly valuable means of moving toward improved techniques in many fields, but it cannot wholly displace the knowledge that comes from the hard facts of everyday experience."

D. Available empirical evidence is insufficient for projecting and evaluating the consequences of adopting the exclusionary rules proposed in these cases

The constitutional requirements of fair criminal procedure newly enunciated by this Court in recent years have had their origin by statute or judicial decision in the several states. This Court has, to be sure, given these rules general application by making them of constitutional dimension, but it has not originated the substance of the rules themselves. For example, at the time of *Mapp* v. *Ohio*, 367 U. S. 643 (1963), well over a third of the states had already adopted the exclusionary rule for evidence obtained by unlawful means, and the trend was heavily in that direction.[1] At the time of *Gideon* v. *Wainwright*, *supra*, all but thirteen states had statutes requiring that counsel be provided at trial for the defense of indigent defendants in all felony cases, and in eight of those juris-

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[1] The rule barring the use at trial of evidence obtained by unreasonable search and seizure was first introduced into American jurisprudence in the State of Iowa (*State* v. *Sheridan*, 96 N. W. 730 [Ia. 1903]), several years before the Court applied the rule to federal courts in *Weeks* v. *United States*, 232 U. S. 283 (1914). After *Weeks*, although Iowa abandoned the rule, eighteen states had voluntarily adopted it by 1949 (see appendix in *Wolf* v. *Colorado*, 338 U. S. 25, 33-39). By 1960, with several states having adopted the rule subsequent to *Wolf*, the Court observed that "the movement towards exclusion has been halting but seemingly inexorable" (*Elkins* v. *United States*, 364 U. S. 206 at 219). In holding the rule applicable to the states in 1961, the Court referred directly to the experience of the states, particularly that of California (*Mapp* v. *Ohio*, 367 U. S. 643 at 650-653).

dictions counsel was in fact provided in felony cases.[1] At the time of *Griffin* v. *California*, 380 U. S. 609 (1965), all but six states barred comment upon a defendant's failure to testify at trial.[2]

In all these situations, accordingly, the probable consequences of the new constitutional rule were not a matter of speculation, for the rules were already in force on a non-constitutional basis in a large number of jurisdictions. This does not, of course, mean that debate over the merits of these rules had been stilled or that evaluation of their consequences was uniform. It was, however, clear prior to the constitutional decisions rendered in this Court that the substantive rules they embodied had already proved not only tolerable but preferable to their alternatives in many or most of the states, and the practical workings of the rules could thus be observed in the laboratories which the state and local systems furnished.

But such is not the case with the exclusionary rules proposed in the present cases. Only three states, to our knowledge, have adopted rules conditioning the admissibility of pre-arraignment statements on prior warnings to the defendant of his rights to remain silent and to consult counsel, and in these three states the rule is of very recent origin.[3] No state, so far as we know, has as yet established a system for the mandatory and universal provision of counsel for the indigent at the pre-arraignment stage.

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[1] See Brief for Petitioner in *Gideon* v. *Wainwright*, 372 U. S. 335, No. 155 Oct. Term 1962, p. 29; *cf.* Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME, p. 92 n. 262 (U. Va. Press 1965).

[2] See *Tehan* v. *Shott*, —— U. S. ——, 34 U.S.L. Week 4095 at 4098 (January 19, 1966).

[3] See *People* v. *Dorado*, 398 P. 2d 361 (Calif. 1965); *People* v. *Neely*, 398 P. 2d 482 (Oregon 1965); *State* v. *Dufour*, 206 A. 2d 82 (R. I. 1965). In addition, the Pennsylvania Supreme Court has stated (*Commonwealth* v. *Negri*, 213 A. 2d 670, 672 [1965])

(Footnote continued on following page)

Since in these cases, therefore, empirical evidence of the consequences of the proposed rules based on experience from their actual operation is altogether lacking, it would seem especially important to seek evidence from other sources. One would want to know, if only in part, the answer to questions such as the following:

(a) How important is pre-arraignment questioning in the identification and apprehension of those subsequently convicted of crime?

(b) How important are pre-arraignment statements as evidence for the conviction of those accused?

(c) What would be the effect on the interrogation process of (1) previous warning of the right to remain silent; (2) previous informing of the right to assistance of counsel; (3) a requirement that counsel either be waived or be present?

(d) How, in practice, would counsel be made available at the pre-arraignment stage?

This kind of empirical data can, in fact, be obtained, and would be of great value, particularly if studied in relation to available evidence on the effectiveness of alternative means of achieving the same goals. The techniques of the social sciences have already proven to be of considerable assistance in developing a body of usable knowledge in other areas of the law, and in stimulating invaluable reform in those areas. The statistical studies of the Man-

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(Footnote continued from preceding page)
that that state would follow the ruling of the Third Circuit Court of Appeals in *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (1965), where such a warning was held to be required, until further word from this Court. The State of Texas has long provided by statute (Tex. Code Cr. Proc. Art. 727), that a defendant's confession is excludable where he had not previously been warned of his right to remain silent; however, if the confession leads to confirming evidence both these "fruits" and the confession itself are admissible.

hattan Bail Project,[1] for example, have undoubtedly been greatly responsible for awakening the interest of both the bar and the public in thoroughgoing bail reform.[2]

But although empirical data bearing on the questions listed above may be obtainable, it has not as yet been obtained, at least in sufficient quantities to support a presumably enduring constitutional decision of nationwide application. We detail below several of the areas where both present facts and future prospects remain murky.

(1) *The importance of pre-arraignment questioning in law enforcement*

Police and prosecutorial authorities generally regard opportunity for sustained questioning of arrested suspects as essential for the maintenance of tolerable standards of efficiency in the apprehension and conviction of criminals. The validity of this view has been accepted and enunciated in various opinions and at various times by a number of the members of this Court, and on at least two occasions has commanded a majority. *Haynes* v. *Washington*, 373 U. S. 503, 515 (1963); *Crooker* v. *California*, 357 U. S. 433 (1958) at 440-441, in which the opinion of the Court remarks that elimination of police questioning would have a "devastating effect on law enforcement." See also *Cicenia* v. *Lagay*, 357 U. S. 504 at 509 (1958).[3]

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[1] See Ares, Rankin and Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U.L. Rev. 67 (1963); Wald, *Pretrial Detention and Ultimate Freedom*, 39 N.Y.U.L. Rev. 631 (1964); Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. Rev. 641 (1964).

[2] See generally *Proceedings and Interim Report of the National Conference on Bail and Criminal Justice* (1965), esp. pp. xiii-xxxii (Interim Report, Apr. 1965) and pp. 6-17 (Address of Chief Justice Warren to the Opening Session of the Conference, May 27, 1964); *cf.* Paulsen, *Pre-Trial Release in the United States*, 66 Col. L. Rev. 109, 116-119, 122-125 (1966).

[3] There are other significant comments on the matter by members of this Court. See, *e.g.*, Mr. Justice Jackson's concurring opinion in *Watts* v. *Indiana*, 338 U. S. 49 (1949) at 58, and Mr. Justice Frankfurter's opinion in *Culombe* v. *Connecticut*, 367 U. S. 568 (1961) at 578-580, with citations to much of the voluminous literature on the question.

The authority of the decisions reached in the *Crooker* and *Cicenia* cases was questioned in *Escobedo* (378 U. S. 492), but not on the basis that the *Crooker* opinion's evaluation of police interrogation was unsound. Indeed, those members of the Court who dissented in the *Crooker* and *Cicenia* cases, and those who comprised the majority in the *Escobedo* case, have not based their conclusions on the premise that police interrogation of suspects is of little value in terms of law enforcement.

This favorable evaluation of police questioning has not gone unchallenged in recent months. Perhaps the most conservative recent estimate as to the value of confessions is that of Judge Nathan Sobel, who finds that confessions are used in less than 10 per cent of the criminal trials in Kings County, New York.[1] Judge Sobel's estimate has been sharply contradicted in several quarters, however, notably by New York County District Attorney Frank Hogan, who has noted that a recent study by his staff indicated that admissions had been made by 62 of 91 defendants in pending homicide cases.[2] Mr. Hogan added that "assistant prosecutors told him that 25 of these, or 27%, could not have been indicted at all if there were no confessions."[3]

Without venturing to pass judgment as between any of these estimates, we suggest that the extent to which confessions are used in evidence is not the only value of police interrogation. Often the questioning furnishes leads to other evidence, and no doubt there are many pre-arraignment admissions and confessions which are not offered at

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[1] N. Y. Law Journal, Nov. 15, 1965, p. 1, col. 6, p. 4, col. 5. Judge Sobel's statistics are based on a survey of the first 1,000 indictments filed in Kings County, New York, subsequent to January 7, 1965. As he acknowledges (*id.* p. 4, col. 5), this is a small sampling; it also gives no hint of the extent to which police questioning may have led to other evidence, or to the immediate release of a suspect.

[2] *N. Y. Herald Tribune*, Dec 2, 1965, p. 31.

[3] *Id.*

the trial because checking their contents led to sufficient independent proof.

Other available statistics indicate that confessions or admissions are made, and used, in quite a high percentage of cases. See, *e.g., Supplementary Memorandum on Behalf of Respondents* in *Linkletter* v. *Walker* and *Angelet* v. *Fay*, Nos. 95 and 581, respectively, Oct. Term 1964 (statistical tables pp. 8-14, summarizing a study of the trial records of the last 100 persons executed for murder in New York prior to 1961, indicate that statements made to the police, after arrest, were introduced in the trials of 85 of those defendants); Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 Calif. L. Rev. 11, 35-44 (1962) (three month study of police performances in two California cities in 1960 showed that between 75 and 90% of all persons charged with crimes had given confessions after what the author terms "surprisingly short" periods of interrogation). The *amicus* brief of the National District Attorneys Association in the present cases presents similar statistics.

Another function of police questioning—perhaps even more important to the effective day to day administration of justice than the solution of a few major crimes—is that of screening cases where an arrest may well have been made upon probable cause but where a decision to charge cannot or should not be made without some further investigation by the police and some evaluation by the prosecutor of the circumstances of the arrest and the availability of admissible evidence. See Bator and Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 Col. L. Rev. 62, 68-70 (1966); LaFave, ARREST, 319-341 (1965). As Professors Bator and Vorenberg have pointed out, the problem of police questioning must be considered in the context of a going system of law enforcement. Bator and Vorenberg, *supra*, at 69. In any large metropolitan area, a great number of persons will be lawfully arrested for a wide

variety of reasons; routine preliminary questioning may well result in their release prior to the filing of any charge, or in the filing of less serious charges. *Id.*, at 69-70, see also Barrett, *supra*, at 31-35.

The California surveys which are the subject of Dean Barrett's study are particularly illuminating in this regard. They indicate that 28.5% of the persons arrested and booked for felonies in California in 1960 were released without the filing of a complaint; in an additional 21.6% of the cases the felony arrests eventually resulted in the filing of misdemeanor complaints. Barrett, *supra*, at 31-35. To the extent that such preliminary screening can be accomplished without subjecting the individual to coercive interrogation—and the available evidence indicates that coercive interrogation is not at all typical of police questioning[1]—it is obviously desirable both in terms of administrative efficiency and in terms of avoiding the unnecessary stigmatization of a person as one who has been charged with crime.

We recognize, of course, that the utility of police interrogation in law enforcement is not the only factor bearing on the issues presented by these cases. But if competing values must be considered, then it is necessary to have as accurate a gauge of their weight as is possible.

On that score, it must be recognized that our present knowledge is far from complete, as the conflicting estimates cited above amply demonstrate. Nevertheless, it is clear

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[1] See, *e.g.*, LaFave, *supra*, at 386, where the author observes that

> "In the great majority of in-custody interrogations observed [in the states of Michigan, Wisconsin and Kansas, in 1956 and 1957], the possibility of coercion appeared slight. In many instances the suspect is merely confronted with the evidence against him or with evidence inconsistent with his prior statements and is asked to give an explanation. Often he is just given an opportunity to admit to other outstanding offenses recited to him. Lengthy, continuous questioning is the exception rather than the rule. In practice the interrogating detective often terminates the questioning after a brief period to appear in court or to check upon statements already given by the suspect."

that there is a widespread belief among judges, prosecutors, and police officials that interrogation is of *great* importance to law enforcement. Until the contrary appears, therefore, this Court should adhere to the view, expressed in Mr. Justice Goldberg's opinion in *Haynes* v. *Washington, supra,* that (373 U. S. at 515): "Such questioning is undoubtedly an essential tool in law enforcement."

(2) *Effect of the presence of counsel on pre-arraignment interrogation*

Assuming (as one must in the present state of knowledge) that police questioning is an essential part of law enforcement, the next question generated by these cases goes to the effect on the interrogation process of the warning admonitions with respect to constitutional rights and, more important, of the actual presence of counsel during the course of interrogation.

Lack of knowledge on this point is openly acknowledged in the petitioner's brief in No. 759 (*Miranda*) wherein it is stated (Br. p. 45) that: "As a practical matter, we cannot know with assurance whether amplification of the right to counsel in the interrogation period will severely handicap the police; we end by trading opinions." We earnestly suggest that some knowledge of this matter is vital for enlightened decision-making, particularly of constitutional dimension.

Members of this Court have addressed themselves to this point on several occasions. In *Cicenia* v. *Lagay, supra,* Mr. Justice Harlan, speaking for a majority of the Court, expressed the view (357 U. S. at 509) that consultation with counsel in the course of pre-arraignment interrogation "would constrict state police activities in a manner that in many instances might impair their ability to solve difficult cases." Mr. Justice Frankfurter, writing in the *Culombe* case, *supra,* was more categorical (367 U. S. at 580): "Legal counsel for the suspect will generally prove

a thorough obstruction to the investigation." No doubt many lawyers would readily accept Mr. Justice Jackson's analysis of the consequences in his concurring opinion in *Watts* v. *Indiana, supra,* 338 U. S. at 59:

> "To bring in a lawyer means a real peril to solution of the crime because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."

To be sure, as Mr. Justice Goldberg pointed out in the *Escoboedo* case (378 U. S. at 488), this point "cuts two ways", inasmuch as it highlights the suspect's need of counsel at the same time that it emphasizes the importance to the police of an atmosphere conducive to communication. Analysis of the conflicting considerations implicit in this comparison takes us beyond the empirical problem. Once again, we do not suggest that police efficiency is the only goal of criminal procedure. But in resolving these issues, precision in weighing the individual factors is desirable.

It may be that consultation with counsel would prove to be less of an obstacle to police interrogation than has been generally assumed. But for such a possibility there is at present no significant empirical evidence, and this lack carries its own warning of caution in the enunciation of new constitutional requirements.

A further problem, closely related to the one directly in view, is that the response of the bar to a general requirement of counsel in the pre-arraignment stages cannot be accurately forecast. We agree with the petitioner in No. 759 (*Miranda,* Br. pp. 38-39) that the cost factor should not be determinative, but we think he is quite wrong in regarding the problem as primarily one of cost.

Legal services are, after all, professional services, and shortages of qualified professional services cannot be immediately rectified with money. There is a serious shortage of doctors in this country, quite beyond the reach of prompt cure by the appropriation of public funds.

If, as the petitioner in No. 761 (*Westover,* Br. p. 34) suggests, all jails should be equipped with public defenders, then one must ask who they will be and what will they do. One must ask the same questions if it is anticipated that private lawyers will be subsidized for these purposes.

Assuming that the privilege against self-incrimination is the principal legal element in the interrogation problem, virtually the only function of station-house counsel will be to paste adhesive tape over his new clients' mouths. It is at best dubious whether such a practice would attract the cream of the bar.

Possibly some sort of special training would be necessary to qualify members of the bar for these new pursuits. At all events, it is plain that at present the bar is not equipped, either conceptually or numerically, to cope with the demands which would follow in the wake of the rules proposed by some of the petitioners in these cases.

E. Variety and imprecision of proposals to extend the right to counsel to pre-arraignment interrogation

"There is a tide in the affairs of men," declares the petitioner in No. 759 (*Miranda,* Br. p. 34), "and it is this engulfing tide which is washing away the secret interrogation of the unprotected accused." We think that whatever "it" is might better be described as a tide-rip, in the churning waters of which various and mutually conflicting proposals are being banged against each other. This conflict is most apparent with respect to the proposed point in time at which the right to the assistance of counsel attaches, and to the consequences which are anticipated to flow from recognition of the right.

None of the defendants in the present case proposes that the right should attach prior to taking the accused into custody at the police station, but beyond that point there is little or no agreement. In No. 761 (*Westover,* Br. p. 34), for example, petitioner apparently suggests that the right attaches as soon as the suspect is in custody, though there is also a suggestion that this is not the case until there is "interrogation directed toward eliciting a confession." In the view of counsel for Westover, the consequence will be that a lawyer will be present and available at all jails to represent the interrogated suspects.

The petitioner in No. 759 (*Miranda*) does not advert to this precise question, but his major contention is (Br. p. 11) that "There is a right to counsel for arrested persons when interrogated by the police", and from this it may be inferred that the right accrues when interrogation commences. Apparently it is also his view (Br. pp. 39-49) that interrogation will continue, and that counsel will always be present.

In No. 760 (*Vignera*), the petitioner has attempted to achieve greater precision, utilizing language drawn from the *Escobedo* case, 378 U. S. at 492, and states his test as follows (Br. p. 38):

> "In practice, it would operate as follows: When the proceeding has become accusatory, the police or prosecutor will be obliged to warn the accused of his absolute constitutional right to silence and of his right to consult with counsel *before* talking any further with the police. If the accused thereupon intelligently and effectively waives his right to silence and his right to immediate consultation with counsel, the interrogation can continue. If the accused wishes to consult with previously retained counsel, he will be permitted to do so and the interrogation will not continue while the police are awaiting the lawyer's arrival. If the accused does not already have counsel and is indigent, the

police may adopt one of two procedures. They may suggest the local public defender or Legal Aid Society and provide access to telephone communication. On the other hand, if the police are unwilling or unable to recommend such counsel, they will simply terminate the interrogation at that point."

Petitioner in *Vignera* does not share the taste of Westover for jails equipped with lawyers; the "automatic assignment of counsel at the station house", he declares (Br. p. 40), would be "an impractical solution and one which the police are ill-equipped to achieve". From this and other passages in the brief, it seems clear that counsel for Vignera is prepared to reckon with frequent terminations of interrogations when the "accusatory" point is reached.

Inasmuch as in the *Escobedo* case an Assistant State's Attorney was called to help frame and to record the confession (378 U. S. at 483), the Court was warranted in describing the process as "accusatory" rather then "investigatory." Yet it seems to us far from clear that the "accusatory-investigatory" comparison in *Escobedo* was intended as a test of general application in future cases, rather than merely as a description of the circumstances in the case at hand. The usefulness of the "accusatory" test has been recently questioned by the Court of Appeals for the Second Circuit, sitting *en banc*, in *United States* v. *Cone*, ——F. 2d —— (Nov. 22, 1965, slip opinion pp. 3391, at 3398-99):

"It has been suggested that the process of questioning suspects may be dissected into 'investigatory' and 'accusatory' phases and that certain legal conclusions, such as whether the Sixth Amendment's right to counsel 'attaches' and requires that the suspect be advised of his rights to silence and counsel, should flow from a judicial finding that police questioning has passed beyond mere investigation. We do not consider this a realistic doctrine for most cases. It was not the job

of the agents questioning Cone, nor were they qualified to make nice decisions about the sufficiency of the evidence they possessed; nor could they at the time of arrest determine what charges should be formally made and against whom. Agents in hot pursuit of those whom they have reason to believe may be implicated in a crime which has just been discovered cannot be required 'on the spot' to decide difficult questions of the sufficiency and quantum of proof.

We think a judicial inquiry into whether the agents were still in the 'investigatory' stage when they arrested Cone, and whether what had started out as an investigation had reached the 'accusatory' stage when Cone was questioned immediately after his arrest, would serve no useful purpose. What may seem to be sufficient evidence at one stage of an investigation may become quite insufficient when those who have supplied information are themselves accused and become unavailable to the government as witnesses, as happened with Moser and Spencer in this very case. To make judicial assessment of the questioning process turn on whether questioning occurred when a case was no longer in the 'investigatory' stage and had entered the 'accusatory' stage would force police officers to make momentary and critical decisions so unrelated to the actualities of law enforcement that the entire police function might well be significantly undermined or demoralized."

It is true that in several recent decisions the "accusatory-investigatory" language of *Escobedo* has been used as a test.[1] Nevertheless, we share the doubts expressed in the Second Circuit. A typical police investigation may involve

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[1] *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (3d Cir. 1965); *People* v. *Dorado*, 42 Cal. Reptr. 169, 398 P. 2d 361 (1965); *State* v. *Neely*, 239 Ore. 487, 398 P. 2d 482 (1965); *cf. State* v. *Dufour*, 206 A. 2d 87 (R. I. 1965).

the employment of a large number of detectives simultaneously searching for evidence, pursuing different leads, interviewing witnesses and suspects or possible suspects, and checking out alibis. The discovery of a single piece of evidence might focus suspicion on a single individual at any given point in time, yet not justify regarding him as an accused, particularly where there may not be enough evidence even to justify holding him in custody. Even where the case is a routine one, a determination of when an investigation has reached the accusatorial stage involves judgments which cannot easily be made even by courts acting after the fact, much less by a police officer who may be acting in extremely pressing circumstances.

In *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (3rd Cir. 1965), the Court of Appeals for the Third Circuit, in ruling that the interrogation there involved had reached the "accusatory" stage, gave weight (351 F. 2d at 437) to the volume of independent evidence implicating Russo at the time he confessed. Petitioner in *Vignera* (Br. p. 16) endorses this as one of the indicia of the "accusatory" stage.

We find the implications of this troublesome, for it leads to the consequence that good detective work and the accumulation of independent evidence will operate to shorten rather than lengthen the permissible period of "investigatory" interrogation. Ordinarily the police utilize interrogation to confront a suspect with evidence of his implication in the crime, both to see whether he can offer credible exculpatory explanation, and to stimulate admissions if no such explanation can be given. But under the "accusatory" test as applied in the *Russo* case, the police face the prospect that the greater the reason for interrogation of the suspect, the less will be their right to do so, unless counsel is brought into the picture.

We have considered the several proposals and the tests not so much to study their intrinsic merits and demerits,

as to demonstrate their variety and imprecision, and indicate the numerous questions they suggest but do not resolve. These matters are, we believe, highly relevant to the constitutional dimension of these cases, for they argue strongly against "freezing" the pre-arraignment scope of the right to counsel at a time when analysis of the problem is still in its infancy.

F. Importance of non-constitutional decisional sources

In this brief, we have urged that the scope of the right to the assistance of counsel prior to arraignment presents problems which are not ripe for constitutional disposition. In support of this viewpoint, we have sought to draw the Court's attention to a number of aspects of the problem, where, we believe, empirical evidence is insufficient for definitive rule-making, and to the uncertainties still surrounding the specific proposals that have been made to extend the right to counsel into the prearraignment stage.

We would like to close this portion of the brief on an affirmative note, by pointing out that the Constitution is by no means the only tool for the solution of problems of criminal procedure and that legislatures, state courts and professional organizations are currently concerned and actively engaged with pre-arraignment questions including the right to counsel. Nor is the field devoid of ideas and proposals alternative to those urged by petitioners in the present cases.

Public and professional concern with police interrogation centers chiefly on the possibility of abusive, oppressive practices, both physical or psychological, that subject the arrestee to pressures which violate the policy if not the letter of the Fifth Amendment privilege against self-incrimination. Furnishing counsel is one but only one of many means of ensuring that the suspect has an opportu-

nity to make a responsible choice as to whether or not to incriminate himself. There are a wide variety of alternative means by which this goal might be met, including rules barring the use of any confession made to the police; or made to the police during a delay in bringing a suspect before a magistrate; or made by a suspect who has not been warned of his right to remain silent; or made after the suspect has been denied a requested opportunity to consult family or friends or a lawyer; or shown by an evaluation of the "totality of the circumstances" to have been physically or psychologically coerced.

These rules obviously could be employed in combination. Indeed, it appears that the draftsmen of the American Law Institute's proposed Model Code of Criminal Procedure have contemplated an exclusionary rule based on a combination of requirements, including precise time limitations on the length of custody for pre-arraignment questioning; a requirement that a suspect be informed that he is under no obligation to talk; proscriptions against incommunicado detention and against other potentially coercive practices; and a prohibition of any questioning in the absence of counsel once detention has extended beyond a specified period of a few hours, except where there has been an explicit consent to such questioning. See Bator and Vorenberg, *supra*, at 71-76.

We do not suggest that any one of these alternatives is necessarily preferable to the others, or would protect the individual's privilege against compulsory self-incrimination better than would a rule requiring the state to furnish counsel at the stationhouse. We do suggest that the states should have an adequate opportunity to develop alternative methods. It may well be that experience will show that the alternatives provide adequate protection against police coercion, while having a significantly less damaging effect on the detection and prevention of crime.

The complex problems in the area of pre-arraignment procedure[1] are particularly appropriate for solution by legislation rather than by judicial decision. As Judge Kaufman stated in *United States* v. *Drummond*, —— F. 2d —— (2d Cir., Dec. 2, 1965, slip opinion pp. 3425, 3444):

> "... our Constitution guarantees fundamental rights, not the utterance of some judicially-ordained shibboleth. A decision based on constitutional fiat, therefore, is not a desirable method for reaching an informed resolution of the pre-trial access to counsel problem. This is precisely the sort of question that can best be answered after the investigative, experimental, and interest-balancing methods of the legislature are utilized."

A legislature is not limited by the facts of a particular case, and can deal constructively with the problems of police questioning in the context of the broad range of problems which exist in the pre-arraignment area. Questions of permissible police conduct during questioning of a suspect obviously bear a close relationship to standards for initial stopping, arrest, search, and subsequent detention. A legislature, working within a broader framework, can adjust the interrelated portions of the process without rejecting the ultimate goals sought by the proponents of an exclusionary rule based on the right to counsel. In addition, a legislature can be more specific than a court; the precise language of a statute may provide for more effective guidance than a judicially created rule formulated on the facts of particular cases.

Large-scale scholarly efforts—most significantly the American Bar Association's project on minimum stand-

[1] Judge Friendly, remarking upon the complexity of this subject, has noted that the ALI's partial preliminary draft on pre-arraignment procedure spreads over fifty pages. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 930 (1965).

ards of criminal justice and the drafting of a Model Code of Pre-Arraignment Procedure by the American Law Institute—are underway, and may be expected to provide a basis for constructive action by state legislatures and courts. Even if the states did not all promptly adopt new statutory rules in light of the ALI Model Code, the Code —and its offshoots in the states that used it as a model— would provide valuable guidelines for courts faced with recurring problems in this area. See Friendly, *loc. cit. supra*, at 929.

We do not think the Court need be concerned that the state courts will rest content with old precedents, or ignore the demands of changing times and standards. As we have already noted, in other areas of criminal procedure the Court's new constitutional pronouncements followed state court decisions which, in fact, formed an important part of the basis for this Court's decisions.

The same progressive tendency is manifest among the state courts that have dealt extensively with problems pertaining to the right to counsel. For example, this Court's two most controversial recent decisions—i.e., the *Massiah* and *Escobedo* cases—had previously been anticipated in closely comparable decisions in New York State. In *People* v. *Di Biasi*, 7 N. Y. 2d 544 (1960), the New York Court of Appeals reversed a conviction because, as in the *Massiah* case (1964), the defendant made a statement (received in evidence at his trial) after indictment and in the absence of counsel.[1] In *People* v. *Donovan*, 13 N. Y. 2d 148 (1963), the court reached the same result where, as in *Escobedo* (1964), the defendant, prior to arraignment, had been denied access to his retained counsel.[2]

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[1] In *People* v. *Meyer*, 11 N. Y. 2d 162 (1962), the same rule was applied to a statement made after arraignment but before indictment.

[2] The *Donovan* case was cited with approval in the *Escobedo* case, 378 U. S. at 486-87.

Very recently, in *People* v. *Gunner*, 15 N. Y. 2d 226 (1965), the court extended pre-arraignment rights to counsel considerably beyond the holding of the *Escobedo* case. In the *Gunner* case, the defendant had made pre-arraignment statements to the police both before and after a lawyer had informed the police that he represented Gunner and wished that no more statements be taken. The conviction was reversed because the statements made after the lawyer's request were received at the trial; two members of the Court would have ruled the earlier statements likewise excludable, because the defendant had not been warned of his rights. See also *People* v. *Friedlander*, 16 N. Y. 2d 48 (1965).

If some other states have not yet had occasion to pursue the questions, or have reaffirmed more limited concepts of the right to counsel, that is still an insufficient reason for this Court to enlarge the constitutional requirements. The opportunity for constructive and varied development is one of the great values of the federal system. To let pass an opportunity such as presently exists for the development by the states of workable rules in this area of strong conflicting values would do great disservice to the principles of federalism and, we suggest, to the healthy development of criminal procedure in the United States.

II

New exclusionary rules limiting the admissibility of pre-arraignment statements should not be applied retroactively.

No. 762, *Johnson and Cassidy* v. *New Jersey*, is a proceeding for post-conviction relief in which petitioners contend that their pre-arraignment incriminatory statements, received in evidence against them at trial, were constitutionally inadmissible under the principles subsequently enunciated in the *Escobedo* case. The Supreme Court of New Jersey affirmed the denial of their applica-

tion, ruling that the *Escobedo* case established new rules of constitutional due process which should not be applied retroactively.[1]

In their brief (at pp. 32-34) in No. 762, the petitioners reject the conclusion below that *Escobedo* established new rules of constitutional law, and contend that the case therefore involves no problem of retroactivity. As *amici curiae*, we express no opinion on that question. Assuming, however, that this Court should agree with the New Jersey court's analysis of *Escobedo*, the problem of retroactivity must then be faced, as it also must in the event new exclusionary rules are to be established in the present or subsequent cases.

The Court has made it clear in two recent cases that not all new constitutional rules must be applied retroactively; rather the merits and demerits of retrospectivity must be weighed with respect to each case, by looking to the nature, purpose, and effect of the new rule, the reliance placed upon the previously existing rule, and the effect upon the administration of justice of a retroactive application of the new rule. *Linkletter* v. *Walker*, 381 U. S. 618, 628-29, 636 (1965); *Tehan* v. *Shott*, —— U. S. ——, 34 U.S.L. Week 4095, 4096 (Jan. 19, 1966). We submit that an examination of these considerations in the context of an exclusionary rule limiting the admissibility of pre-trial statements makes it amply clear that no such rule should be applied retroactively so as to vitiate a final conviction.

A. The state judicial systems and state law enforcement officials have justifiably placed great reliance on past decisions of this Court establishing voluntariness as the sole criterion for admissibility of a pre-arraignment statement.

There can be no doubt that over the course of years there has been extensive and justifiable reliance by the

[1] Other issues, unrelated to those discussed in this brief, are also raised by petitioners in No. 762.

state judicial systems upon this Court's decisions establishing voluntariness as the criterion for determining the admissibility of a pre-trial statement of an accused. Indeed, the Court had specifically held that the introduction of incriminating statements obtained in the absence of counsel—even after the defendant had clearly become the focus of a police investigation and had requested counsel—was no constitutional bar to a valid judgment where the statements were not involuntary. *Crooker* v. *California*, 357 U. S. 443 (1958); see also *Cicenia* v. *Lagay*, 357 U. S. 504 (1957); *Culombe* v. *Connecticut*, 367 U. S. 568, 588-602 (1961); *Brown* v. *Allen*, 344 U. S. 443, 474-476 (1953); *Stroble* v. *California*, 343 U. S. 181, 196-198 (1952); *Gallegos* v. *Nebraska*, 342 U. S. 55, 64-68 (1951).

As recently as 1963, the Court reiterated the well established rule that the admissibility of a pre-trial statement depended on its voluntariness, in a case where it held simply that the absence of a warning of a right to silence, delay in arraignment, and lack of opportunity to consult with counsel were factors involved in an assessment of voluntariness. *Haynes* v. *Washington*, 373 U. S. 503, 510-511 (1963). For this Court now to apply a new exclusionary rule retroactively, without regard to the voluntariness of challenged statements, would be to hold that the state courts should not have admitted evidence which this Court had plainly told them was admissible. *Cf. Linkletter* v. *Walker*, *supra* at 637; *Tehan* v. *Shott*, *supra* at 4096-4098.

The reliance of the police and prosecutors is also significant. A District Attorney naturally prepares his case on the basis of what this Court tells him is the applicable law. At least prior to the decision in *Escobedo*, the only federal constitutional bar to the admissibility of a defendant's pre-arraignment statement was involuntariness—if his statement was voluntary, it was admissible. The police, too, must have relied upon the many decisions holding that the relevant criterion was voluntariness. Certainly they

cannot be said to have been on any kind of notice that they were under any obligation to inform a suspect of a "right" to consult with counsel to be provided by the state. In this respect, the case for non-retroactive application of any new rule governing the admissibility of pre-arraignment statements is far stronger than in the *Linkletter* situation; at least during the period following *Wolf* v. *Colorado*,[1] the police knew (or should have known) they were violating the defendant's constitutional rights when they made the searches later complained of.

Surely it cannot be said that the reliance of the state courts, the prosecutors, and the police upon the past decisions of this Court was wholly misplaced. Yet that would be precisely the effect of a holding that a new exclusionary rule—whether based on a requirement of a warning of a right to silence, or of prompt arraignment, or of informing an accused of a right to consult with counsel, or of any variant thereof—must be applied retroactively.

B. The purposes of a new exclusionary rule would not be served by retroactive application

(1) *Deterrence*

The primary purpose of any exclusionary rule limiting the admissibility of pre-arraignment statements would surely be to deter the police from using coercive methods of interrogation which would violate the policy of the privilege against self-incrimination. *Cf. Escobedo* v. *Illinois*, 378 U. S. 478, 487-90; *Crooker* v. *California*, 357 U. S. 433, 441 (1958); (Douglas, J., dissenting); *People* v. *Dorado*, 42 Cal. Rptr. 169, 398 P. 2d 361, 367-369 (1965).

Clearly however, as this Court recognized in the *Linkletter* case, *supra*, at 636-637, the deterrent purpose of an exclusionary rule cannot be served by its application to past trials. It is self-evident that past conduct cannot be deterred; that "ruptured privacy . . . cannot be re-

[1] 338 U. S. 25 (1949).

stored". *Linkletter, supra,* at 637; *Tehan, supra,* at 4098. To the extent that an exclusionary rule serves as an effective deterrent to a particular kind of police conduct it is because the police, after the establishment of such a rule may be expected to act appropriately with knowledge of its sanctions.

(2) *Protection of the innocent*

The Court observed in *Tehan* that—notwithstanding passages in the majority opinion in *Griffin* v. *California* which would indicate the contrary[1]—the rule established by the *Griffin* case did not relate primarily to protecting the innocent against conviction. *Tehan* v. *Shott, supra* at 4098. A new exclusionary rule governing the admissibility of a defendant's statements would in this respect have even less claim to retroactive application than would the rule barring comment.

The danger of convicting the innocent on the basis of his own statements lies in the possibility that physical or psychological coercion might have produced an unreliable statement. To the extent that this is a real possibility, however, retroactive application of a new exclusionary rule is unnecessary. The involuntariness of a defendant's statement has long been grounds for exclusion at trial and for reversal on appeal (see *Brown* v. *Mississippi*, 297 U. S. 278 [1936]; *cf. Bram* v. *United States*, 168 U. S. 532 [1897] and authorities cited therein), and at least where the sate's procedure for testing voluntariness has been found unreliable (see *Jackson* v. *Denno*, 378 U. S. 368 [1964]), post-conviction relief is generally available in the state courts (see *e.g., People* v. *Huntley*, 15 N. Y. 2d 72 [1965]). Moreover, federal habeas corpus is available for a claim of involuntariness; thus, insofar as a delay in arraignment, or the lack of a warning as to a right to silence or to consult a lawyer, may have contributed to the making of an in-

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[1] See *Griffin* v. *California*, 380 U. S. 609 at 613 (1965).

voluntary statement, relief is available. See, *e.g.*, *Reck* v. *Pate*, 367 U. S. 443 (1961); *Fay* v. *Noia*, 372 U. S. 391 (1963); *cf.* Brief for Petitioners in *Johnson and Cassidy* v. *New Jersey* (No. 762) pp. 32-34.[1]

(3) *The integrity of the judicial system*

In the *Tehan* decision, the Court emphasized that the complex of values which go into the privilege against self-incrimination relate primarily to preservation of a judicial system in which the guilty are not to be convicted unless the prosecution "shoulder the entire load". *Tehan*, *supra*, at 4098. The Court's finding in *Tehan* that the rule of *Griffin* v. *California*—aimed at protecting the privilege against self-incrimination—should not be held retroactive is obviously relevant in the context of the exclusionary rules now urged upon the Court, all of which also relate primarily to protection of that privilege.

Rather than being in any way furthered by retroactive application, the integrity of the judicial system—in the sense that the system symbolizes a steady and reliable institution—would be seriously undermined by retroactive application of a new exclusionary rule, since a holding of

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[1] Of course, while federal habeas corpus may always be available for a claim that a statement was based on physical or psychological coercion, the states must be recognized to have a strong interest in limiting the availability of collateral attack in their courts to cases in which, *for good cause*, a constitutional claim was not previously raised. The New Jersey Supreme Court, after noting that petitioners' present allegations with respect to denial of an opportunity to consult counsel and failure to advise of the right to remain silent had not been raised in any prior proceedings—despite antecedent New Jersey decisions holding that these factors are relevant to the issue of voluntariness—held that its prior adjudication of the voluntariness question precluded further consideration of that issue. *State* v. *Johnson*, 206 A. 2d 737 at 740. The Court did not inquire into whether there were exceptional circumstances which would justify the failure to raise these issues earlier in the context of the voluntariness issue—perhaps because the petitions for post-conviction relief did not allege any excuse for this failure. *Cf. Fay* v. *Noia*, 372 U. S. 391 (1963).

retroactivity would necessarily draw into question the value of this Court's decisions as a guide for future conduct. To hold that the reliance of the state courts and state law enforcement officers upon the past decisions of this Court was wholly misplaced would cast doubt upon the precedental value of any new decision in the criminal law field. Predictability is certainly an important value in this area of the law (*cf. Pointer* v. *Texas,* 380 U. S. 700, 411, 413 [Goldberg, J., concurring]), yet that value would be completely rejected by retroactive application of a new rule in this area. Furthermore, the confidence of the public in its legal system surely would not be enhanced by the wholesale release from prison of persons whose guilt of serious crimes is not questioned, on the basis of retroactive application of a new rule which does not relate to the reliability of the conviction.

C. Retroactive application of a new exclusionary rule would place overwhelming burdens on the administration of justice by the states

The opinions of this Court in the *Linkletter* and *Tehan* cases placed heavy emphasis on the fact that retroactive application of the rules at issue in those cases would place great stresses on the administration of justice. The retroactive application of a new exclusionary rule affecting the admissibility of pre-trial statements would, however, place even more severe burdens upon the administration of justice.

(1) A great number of cases would have to be reopened, and a large number of persons—particularly those under long sentences, for serious crimes—would inevitably be released from custody

There can be little doubt but that retroactive application of a new exclusionary rule affecting the use of a defendant's pre-trial statements would result in the reopening of more convictions than would a retroactive application

of the *Mapp* exclusionary rule. What is perhaps even more significant is the fact that such statements, or their fruits, are most apt to have been used in prosecutions for violent, frequently unwitnessed crimes, such as murder, manslaughter, rape, kidnapping and robbery. The individuals convicted of these crimes are the ones who would be most likely to reap the benefits of retroactive application of a new rule in this area.[1]

The pre-trial statements of the defendants were introduced at the trials of 85 of the last 100 persons executed in New York State prior to 1962.[2] It is certainly reasonable to suppose that a similarly high percentage of incriminatory statements was introduced at other trials for serious crimes. Few indeed are the cases in which such statements were made in the presence of counsel or after consultation with counsel. The persons who had been convicted at trials at which such statements were used would, by hypothesis, receive the benefit of retroactive application regardless of the fact that they were convicted fairly under the law as it stood at the time of the trial, despite the reliability of the adjudication of guilt, and irrespective of the voluntariness of their statements.

Application of any new exclusionary rule to convictions which became final prior to the change in the law would, of course, afford significant advantages to the convicted

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[1] Some idea of the impact upon old convictions of these serious crimes may be gained from the statistics presented to this Court last year by the New York Attorney General and the National District Attorneys Association in connection with the cases involving the retroactivity of the *Mapp* exclusionary rule. See text at p. 25, *supra*. As of June 30, 1964, some 13,869 persons were imprisoned in New York for felony convictions; of these, 4,543 were imprisoned pursuant to convictions had prior to January 1, 1961. Over 50% of those imprisoned for over 3½ years—2,607 of the total, of 4,543—had been convicted of murder, manslaughter, kidnapping, rape or robbery. See Supplementary Memorandum on Behalf of Respondents in *Linkletter* v. *Walker* (No. 95, Oct. Term 1965) and *Angelet* v. *Fay* (No. 578, Oct. Term 1965) at page 4.

[2] Supplementary Memorandum (*supra*, n. 1) at pp. 8-14.

individual who sought to take advantage of the new rule via an application for post-conviction relief. Both on collateral attack and, if that succeeded, upon retrial of the case, the passage of time—with the consequent dimming of memories, death or departure of witnesses, and loss of relevant records—would inevitably work to the accused's advantage. See, *e.g., Tehan* v. *Shott, supra* at 4099; *Linkletter* v. *Walker, supra* at 637-638; *United States ex rel. Angelet* v. *Fay,* 381 U. S. 65 (1965); *United States* v. *Sobell,* 314 F. 2d 314, 325 (2d Cir.), cert. denied 374 U. S. 857 (1963); Bator, *Finality in the Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441, 478 (1963). As Judge *Friendly* observed in writing for a unanimous Court in the *Sobell* case, *supra* at 325:

> "collateral attack can come at any time. Yet normally it is quite academic to talk of a new trial ten or fifteen years after the event; in most cases to direct one after such an interval is in practical result to order a release from further punishment, although the defendant does not even contend that he is entitled to that relief from the courts."

(2) *Retroactive application of a new rule would impair the future development of progressive solutions to the difficult problems of criminal procedure*

The recent decisions of this Court with respect to the admissibility of pre-trial statements made in the absence of counsel have been founded substantially on the prior development of similar rules by the state courts, particularly the New York Court of Appeals. See *Massiah* v. *United States,* 377 U. S. 201 at 204-205 (1964) and *Escobedo* v. *Illinois,* 378 U. S. 478 at 486-487 (1964).[1]

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[1] The *Massiah* decision noted some 10 New York decisions, most notably *People* v. *Waterman,* 9 N. Y. 2d 561 (1961); *People* v.

(Footnote continued on following page)

It seems certain, however, that one reason why the state courts have exercised their powers broadly in establishing new exclusionary rules is because of their expectation that the newly enunciated rules would affect relatively few past cases—indeed, only those in which the direct appellate process had not yet been exhausted. The New York Court of Appeals, for example, has declined to apply its new rules retroactively.[1] See *People* v. *Howard*, 12 N. Y. 2d 65 (1962), *cert. denied* 374 U. S. 840 (1963); *People* v. *Dash*, 16 N. Y. 2d 493 (1965). Similarly, the California Supreme Court, one of the few state courts which has interpreted the *Escobedo* decision as requiring a warning of a right to consult counsel and to have counsel provided, even in the absence of a request, has declined to apply its new rule retroactively. Compare *People* v. *Dorado*, 42 Cal. Reptr. 169, 398 P. 2d 361 (1965) with *In re Lopez*, 42 Cal. Reptr. 188, 398 P. 2d 380 (1965).

Significantly, the progressive New York rules were all developed in cases where appropriate and timely objections were made at trial to the use of the statement in question. If collateral attack were to be made broadly

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Rodriguez, 11 N. Y. 2d 279 (1962); *People* v. *Meyer*, 11 N. Y. 2d 162 (1962); and *People* v. *DiBiasi*, 7 N. Y. 2d 544 (1960). The *Escobedo* opinion relied on *People* v. *Donovan*, 13 N. Y. 2d 148 (1963). This Court has also relied heavily on state court decisions in developing the exclusionary rule barring the use at trial of illegally seized evidence. See *Mapp* v. *Ohio*, 367 U. S. 643 at 651-653 (1963).

[1] Significantly, New York has long allowed post-conviction relief for a claim that a conviction was obtained in the absence of counsel. See, *e.g.*, *Matter of Bojinoff* v. *People*, 299 N. Y. 145 (1949). The New York courts thus recognize the great distinction which exists between the case where a defendant has been deprived of the assistance of counsel at trial and the case where a defendant who has had the assistance of counsel at trial later seeks to take advantage of a change in the rules governing the admissibility of evidence. Even though the change may have enlarged the right to counsel at a pre-trial stage, the New York courts will not permit collateral attack in the latter case.

available for claims based on a new exclusionary rule in the confession area, it is to be expected that concepts of trial strategy would be adjusted accordingly. Surely the incentive of defense counsel to challenge an existing rule of law in a developing area would be lessened—a different course could be pursued at trial and, as in the *Johnson* case now before the Court (No. 762), a constitutional challenge could later be made on collateral attack.

Both the lessened likelihood of challenge to existing rules and the spectre of further retroactive effects could be expected to inhibit state appellate courts—and perhaps also the federal courts, which would be flooded with applications from federal prisoners (28 U.S.C. § 2255) and state prisoners (28 U.S.C. § 2241)—from engaging in future constructive decision-making in the area of criminal procedure.

(3) Retroactivity of a new exclusionary rule would impair the ability of the state judicial legal systems to provide post-conviction relief for those individuals whose present incarceration truly amounts to "intolerable restraint"

It would certainly seem that under established principles of comity and exhaustion of state remedies, the state courts would be given the first opportunity to consider a claim for post-conviction relief which is based upon a new exclusionary rule. *Cf.* 28 U.S.C. § 2254; *Case* v. *Nebraska,* 381 U. S. 336 (1965). Clearly, however, the retroactive application of a new exclusionary rule would impose tremendous strains upon the bench and bar in all of the states —very possibly to the detriment of the individuals whose claims for post-conviction relief are more deserving under established principles of criminal justice.

The kinds of claims which have historically been recognized as warranting post-conviction relief are those which go to the fairness of the trial process itself, and which

raise genuine doubt as to the reliability of the adjudication of guilt.[1] The absence of counsel at trial (*Gideon* v. *Wainwright*, 372 U. S. 335 [1963]); the denial of opportunity to appeal (*Griffin* v. *California*, 351 U. S. 12 [1956]; *Eskridge* v. *Washington*, 357 U. S. 214 [1958]; *Douglas* v. *California*, 372 U. S. 356 [1963]); the use of an involuntary confession (*Reck* v. *Pate*, 367 U. S. 443 [1961]; *Fay* v. *Noia*, 372 U. S. 391 [1963]); the use of an unfair and unreliable procedure for testing voluntariness (*Jackson* v. *Denno*, 378 U. S. 368 [1964]); the knowing use of perjured testimony (*Mooney* v. *Holohan*, 294 U. S. 103 [1935]); and trial under conditions of mob domination or inflammatory publicity (*Moore* v. *Dempsey*, 261 U. S. 86 [1923]; *Irwin* v. *Dowd*, 359 U. S. 394 [1959]), fall into this category. These are the kinds of cases in which it can truly be said that continued imprisonment is intolerable (*cf. Fay* v. *Noia*, *supra* at 401-02, 441); where a defendant has really been afforded "no process of law".[2] These are the cases in which the judgment was, in effect, void *ab initio*, and thus subject to attack on federal habeas corpus just as any void judgment is always open to collateral attack. See *Fay* v. *Noia*, *supra*, at 423.

These are the kinds of cases for which many of the states have in the past sought to provide post-conviction relief—and for which, where previous remedies have proven too narrow, the states are now in the process of broadening the remedies under the impetus of the *Noia* decisions. These are the meritorious cases—the ones in which a hearing may well be warranted in order to de-

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[1] See Brief for Respondent in *Angelet* v. *Fay*, No. 578, Oct. Term 1964, pp. 18-20, 32-36; *cf.* Mishkin, *The High Court, The Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56 (1965); *Linkletter* v. *Walker*, *supra*, at 636 n. 20.

[2] Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 455-460 (1963). See also Traynor, *Mapp* v. *Ohio at Large in the Fifty States*, 1962 Duke L. J. 319, 340-341.

termine both the truth of the charges and the desirability of overlooking a prior failure to raise serious issues of both trial fairness and of reliability—upon which the states should be able to concentrate their resources. Indeed, that is clearly the purpose of the new statutes and court rules which have come into being since the *Noia* decision.[1] To require the states to afford collateral relief in a case where, by contrast, there is no doubt as to the factual reliability of a defendant's statement, where the statement was used at a trial at which the defendant had adequate counsel and at which existing law permitted its use, would be to establish an entirely new and unnecessary concept of collateral relief.

The result, inevitably, would be unending litigation by convicted prisoners, and a wholly unwarranted drain on legal resources—the time of judges, lawyers, court personnel and policemen, as well as public funds—at a time when these resources can be far more beneficially allocated to present responsibilities and to the pursuit of constructive legal developments in other areas of the criminal law.

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[1] Recent state statutes, court rules and judicial decisions are collected in the concurring opinion of Mr. Justice Brennan in *Case* v. *Nebraska*, 381 U. S. 336 (1965) at 340, 345-346, n. 8. See also Resolution XIV, *Post-Conviction Remedies*, adopted without opposition at the 59th Annual Meeting of the National Association of Attorneys Generals, held July 25-30, 1965. The resolution urges all states which have not yet done so "to adopt, either by statute or rule of court, post-conviction procedures which make it possible to adjudicate all claims of constitutional right properly presented by persons convicted in state court criminal proceedings."

CONCLUSION

For all the foregoing reasons we respectfully submit that the Court, in disposing of these cases, should observe the limiting principles of constitutional review which we have endeavored to set forth.

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